

# The FCC Has Clear Legal Authority to Restrict Forced Arbitration

## Authority Under the Communications Act

The FCC has clear legal authority to limit the use of forced arbitration in broadband privacy claims under the Act.

- § 201 of the Act gives the FCC the authority to prescribe rules that may be necessary in the public interest to carry out the Act.<sup>1</sup> It also requires all practices in connection with communications service to be reasonable, and that any practice that is unjust or unreasonable is prohibited.<sup>2</sup>
- § 222 of the Act provides a duty for providers of communications services to protect both the privacy and security of information about their customers AND provides the FCC with the authority to adopt rules that are necessary to implement this obligation.<sup>3</sup>
- Finally, Congress clearly contemplated a private enforcement mechanism of violations in §§ 206 and 207.<sup>4</sup>
- There are many examples of how the use of forced arbitration clauses is inherently unreasonable and unjust, and that prohibiting its use in this context would be in the public interest. It would also promote the principles of transparency and choice, which are key components of the § 222 framework. Including a limitation on forced arbitration clauses in contracts between BIAS providers and their customers would be in line with Congressional intent under the Act.
- It is therefore undoubtedly within the FCC's authority to limit the abusive practice of forced arbitration.

## The Federal Arbitration Act Is Inapplicable

The FCC is not precluded from limiting forced arbitration clauses by the FAA for several reasons:

- The FAA simply supports the enforcement of written arbitration provisions in contracts.
- The “liberal policy favoring arbitration” confers only the right to have valid arbitration clauses enforced according to their terms, which is not the same as an absolute right to insert forced arbitration clauses into contracts.<sup>5</sup>
- That's because the FAA does NOT give a free-standing legal right to arbitrate.<sup>6</sup>
- While it's true that the Supreme Court has said when a statute is *silent* on arbitration, the FAA requires the arbitration agreement to be enforced according to its terms, in the absence of a forced arbitration clause, there are no terms to be enforced and the FAA legal analysis isn't triggered.
- And, what the Supreme Court has NEVER held is that the FAA prohibits federal agencies from regulating the use of forced arbitration agreements.<sup>7</sup>
- In fact, the Supreme Court has held that the FAA's policies do not preclude a federal agency from employing its delegated authority to adopt “rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights,” *even if that authority says nothing specific about arbitration*.<sup>8</sup>
- As such, the conflict presented between the FCC's authority and the rights conferred by the FAA is a false one and FCC is within its legal authority to limit forced arbitration in broadband privacy claims.

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<sup>1</sup> See e.g. 47 U.S.C.A. § 201. Service and charges.

<sup>2</sup> 47 U.S.C.A. § 202. Discriminations and preferences.

<sup>3</sup> See 81 FR at 23396-7.

<sup>4</sup> See 47 U.S.C.A. § 206. Carriers' liability for damages.

<sup>5</sup> *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012).

<sup>6</sup> See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (“[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement”); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (The FAA “does not confer a right to compel arbitration of any dispute at any time”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (“The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement-upon the motion of one of the parties-of privately negotiated arbitration agreements.”).

<sup>7</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 merely found that a state's law was preempted because it conflicted with the FAA.

<sup>8</sup> *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987).